

Federal Communications Commission

DA98-555

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 96-253
Table of Allotments,)	RM-8962
FM Broadcast Stations,)	
(Bainbridge, Georgia))	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 18, 1998

Released: March 27, 1998

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration of the Report and Order¹ in this proceeding filed by Paxson Communications Corporation ("Paxson"). Chattahoochee Broadcast Associates ("CBA") has filed an Opposition to Paxson's Petition for Reconsideration and Paxson has filed a Reply to CBA's Opposition. For the reasons discussed below, we deny Paxson's Petition for Reconsideration.

2. Background. The Notice of Proposed Rule Making² in this proceeding was issued in response to CBA's petition to allot Channel 270A to Bainbridge, Georgia, as that community's second FM service. Paxson opposed the allotment of Channel 270A to Bainbridge because it would conflict with Paxson's application (File No. BPH-961230IA) to implement the upgrade of Station WXSRR(FM) from Channel 268C2 to Channel 268C1 at Quincy, Florida. In situations such as the one now before us, where an application that conflicts with a petition for rulemaking is filed after the petition for rulemaking, but prior to the close of the initial comment period in the rulemaking proceeding, the Commission compares the merits of the application with those of the rulemaking petition.³ After having conducted such a comparison, the Commission allotted Channel 270A to Bainbridge. The Report and Order observed that Paxson's application specified its present transmitter site, rather than the transmitter site specified in the rulemaking proceeding which upgraded Station WXSRR(FM) from Channel 268C2 to Channel 268C1 at Quincy, Florida.⁴ The Report and Order determined that Paxson's preferred site for its Station WXSRR(FM) upgrade did not provide any public benefit that would outweigh the provision of a new service at Bainbridge. In making this comparison, the Commission did not consider a petition to resolve the Paxson/CBA conflict filed by Clyde Scott, Jr., d/b/a EME Communications ("EME") several months after the record was closed. EME had proposed eliminating the conflict between Paxson's pending

¹ 12 FCC Rcd 13399 (Allocations Br. 1997).

² 11 FCC Rcd 20904 (Allocations Br. 1996).

³ See Conflict Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments ("Conflicts"), 7 FCC Rcd 4917 (1992), recon. granted in part and denied in part, 8 FCC Rcd 4743 (1993).

⁴ The Commission granted authority to upgrade Station WXSRR(FM) in Apalachicola et al., Florida, 11 FCC Rcd 8772 (Allocations Br. 1996).

application for Channel 268C1 at Quincy, Florida, and CBA's proposal to allot Channel 270A to Bainbridge, Georgia, by substituting Channel 221A for Channel 251A at Dawson, Georgia, and substituting Channel 251A for 270A at Bainbridge, Georgia. EME's petition was deemed to be an untimely filed counterproposal in that it introduced a new community to the proceeding and thus should have been filed by the close of the initial comment period.

3. Petition for Reconsideration. In its Petition for Reconsideration, Paxson argues that the Report and Order erred by not considering whether alternate allotments would have resolved the conflict between CBA's proposal to allot channel 270A to Bainbridge, Georgia, and Paxson's application for a minor change in Station WXSJ(FM)'s facilities. Specifically, Paxson claims that the Report and Order did not indicate that the Commission's staff had followed its usual policy of undertaking its own engineering analysis of alternate allotments for the channel proposed in the petition for rulemaking.⁵ Further, Paxson contends that the Report and Order erred in dismissing EME's late-filed counterproposal. Paxson argues that good cause existed for considering the EME counterproposal in that the untimeliness of the filing of that counterproposal was the result of highly unique circumstances. Paxson notes that the Commission Report and Order in Cordele, Georgia et al.,⁶ which freed additional channel allotments that allegedly could be used to resolve the conflict between CBA's proposal and Paxson's application, was not issued until July 1997, which was several months after the comment period in this proceeding had closed. Paxson contends that given the foregoing circumstances and the significant public interest benefit in resolving the conflict between CBA's allotment proposal and Paxson's minor change application, the Commission should have considered the EME proposal.

4. Discussion. We deny the Petition for Reconsideration. As stated earlier, the EME proposal is, in fact, a counterproposal in that it introduces a new community into this proceeding. We will not consider this counterproposal. Section 1.420(d) of the Commission's Rules requires that counterproposals be advanced in initial comments and that counterproposals will not be considered if they are advanced in reply comments. Such a procedure is necessary for the orderly transaction of allotment proceedings. The EME proposal was filed more than five months after the time for filing counterproposals in this proceeding. As noted by CBA, in order to consider EME's Dawson proposal in the context of this proceeding, it would have been necessary to issue a Further Notice of Proposed Rule Making. Such a procedure would not be conducive to the efficient transaction of Commission business and would not have been warranted in order to accommodate a site preference for the Station WXSJ(FM) upgrade. The issue of using alternate channels to resolve conflicts between petitions for rule making and applications filed by the comment date in the rulemaking proceeding was addressed in Conflicts. In Conflicts, the Commission reaffirmed its longstanding procedure of allotting alternate channels whenever possible without prejudice to a timely filed application or petition for rule making. In this case, issuing a Further Notice in order to consider a Dawson channel substitution would be both contrary to our existing procedure and would unnecessarily delay this proceeding to the prejudice of the original rulemaking proponent.

5. The staff conducted a channel search in this proceeding to determine if the mutual exclusivity between Paxson's application and CBA's rulemaking petition could be avoided by the use of an alternative

⁵ Paxson cites the following language from Conflicts at 4745 n.12 (1993), which states that the FCC's staff will:

attempt to resolve conflicts between a rulemaking petition and a later-filed FM application...by allotting an alternate channel for that proposed in the petition, whenever it is possible to do so without prejudice to a timely filed FM application or rulemaking petition.

⁶ 12 FCC Red 9777 (Allocations Br. 1997).

channel at Bainbridge. No such channel was discovered. As explained in the preceding paragraph, we may not consider any alternative channel in a community that had not been proposed prior to the close of the comment period, such as Dawson. Thus, since there is no available alternative channel at Bainbridge whose use would eliminate the conflict between Paxson's application and CBA's rulemaking proposal, and since EME's counterproposal cannot be considered pursuant to relevant law and precedents, we deny Paxson's Petition for Reconsideration.

6. Accordingly, IT IS ORDERED That the Petition for Reconsideration filed by Paxson Communications Corporation IS DENIED.

7. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact R. Barthen Gorman, Mass Media Bureau, (202) 418-2170.

FEDERAL COMMUNICATIONS COMMISSION

Charles W. Logan
Chief, Policy and Rules Division
Mass Media Bureau